IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION

CHAMBER SUMMONS NO.1383 OF 2004
IN
SUIT NO.1551 OF 1979

Rajmal M.Jhaveri & Ors. .. Plaintiffs.
Versus
Gunmala G.Jhaveri & Ors. .. Defendants.

ALONGWITH
CHAMBER SUMMONS NO.1876 OF 2004
IN
SUIT NO.1551 OF 1979

Gunmala Gendmal Jhaveri & Ors. .. Plaintiffs.
Versus
Sushila Kanakmal Gandhi & Ors. .. Defendants.

Mr.M.Akram i/b.Hiralal Thakor & Co. for plaintiffs.
Mr.Vivek Sharma for defendant Nos.2 to 4.

CORAM : A.M.KHANWILKAR, J.

DATE : 8th October, 2007.

P.C.

1. This order will dispose of both the chamber summons by a common order. Chamber Summons No.1383 of 2004 is filed by the plaintiffs, questioning the correctness of

certain amounts in respect of rents and profits considered by the Commissioner in his report dated 30th August, 2002, whereas Chamber Summons No.1876 of 2004 is filed by the Defendant Nos.2 to 4, questioning the correctness of certain conclusions reached by the Commissioner for taking accounts in self-same report dated 30th August, 2004.

2. Having considered the rival submissions and going through the report of the Commissioner, in the judgement, I have to address the issues canvassed before me by the respective parties. The first issue is raised by the Defendant Nos.2 to 4 that the Commissioner has committed manifest error in not allowing the Defendant Nos.2 to 4 to rely on the Bank account in relation to the joint account operated in the Union Bank of India to which the plaintiff No.1 was also signatory along with the Defendant Nos.2 to 4. From the said account, the income and outgoings in relation to

the joint family properties would be discerned.

3. The next grievance of the Defendant Nos.2 to 4 is that the Commissioner has relied on valuation report submitted on behalf of plaintiffs and on that basis assumed that the value of the concerned properties and the income derived, which is excessive and unrealistic. The grievance of the Defendant Nos.2 to 4 is that there was no legal evidence before the Commissioner that, in fact, the said Defendants had received such amount, which is far in excess of the amount referred to in the lease/ tenancy documents in favour of the respective occupants, executed by the Defendant Nos.2 to 4. The question of the Defendant Nos.2 to 4 bringing back the amount on the assumption that the notional amount fixed by the valuation officer is correct and actually received by the Defendant Nos.2 to 4 is unacceptable. Moreover, no relief is claimed in the suit by the plaintiffs for a

direction against the Defendant Nos.2 to 4 to bring back such amount. This argument pertains different premises, namely, let out to Mahindra Holdings and Finance Ltd., another to E.Jusaf, the 3rd item is the hoarding rent out on the suit property and lastly the transfer amount received in lieu of transfer of tenancy in respect of Flat No.4 in the year 2000.

4. The counsel for the plaintiffs have not only opposed the aforesaid arguments of the Defendants but also contended that there are inherent mistakes committed by the Commissioner at reaching the conclusion in respect of certain matters. In other words, both sides have grievance about the appropriateness of the report prepared by the Commissioner in relation to the income and expenditure associated with the different family properties.

5. In the first place, I shall proceed to

deal with the argument of the Defendant Nos.2 to 4 that the plaintiffs have not asked for relief or direction against the Defendant Nos.2 to 4 to bring back any amount. This argument cannot be countenanced. Inasmuch as, the suit filed by the plaintiffs is a suit for partition and for share in the income derived in respect of the joint family properties. If the plaintiffs succeed in getting declaration that they have share in the joint family properties, it necessarily follows that the plaintiffs would be entitled to enjoy all the benefits arising from such properties. Thus understood, the argument of the Defendant Nos.2 to 4 that they cannot be directed to bring any amount in absence of relief claimed in that behalf deserves to be rejected.

6. The second grievance made on behalf of the Defendant Nos.2 to 4 is that the Commissioner has committed manifest error in not considering the bank statement in relation to the joint

account operated in the Union Bank of India, will have to be accepted. It is not in dispute that the plaintiff No.1 is a joint signatory alongwith Defendant Nos.3 and 7 to operate the said account. It is also not in dispute that the said account was essentially operated in regard to the income and expenditure associated with the joint family properties which are subject matter of the suit. If it is so, the Bank account so operated cannot be ignored. The Commissioner, therefore, was obliged to give sufficient opportunity to parties to produce the said Bank statement of Union Bank of India. Suffice it to observe that the approach of the Commissioner in discarding the request of the Defendant Nos.2 to 4 to consider the entries reflected in the Bank's statement relating to account in Union Bank of India will have to be accepted. The Commissioner was obliged to take into account all the entries reflected in the bank account maintained in Union Bank of India being account No.23075. The

certified copy of the Bank statement has already been received by the Registry. The office shall handover the certified copy of the bank statement to the Commissioner, who will be obliged to consider the same in its proper perspective to arrive at correct working / statement of claim of the respective parties.

7. According to the Defendant Nos.2 to 4, the statement of account in Union Bank of India is comprehensive one and would reflect all the income and expenditure in relation to the joint family properties. He further submits that the Defendants have already prepared books of account relating back to year 1987 onwards. In this view of the matter, the Commissioner will have to examine the matter afresh taking into account all the aspects, more particularly, reflected in the account statement of Union Bank of India as also the books of accounts now prepared by the Defendants, which will be produced before the

Commissioner in due course. Indeed, it may appear that the Commissioner will have to reopen the case, but that would be inevitable. Inasmuch as the Bank account of Union Bank of India is the main account which will have to be considered for determining the income or expenditure in relation to the joint family properties of which benefit will be shared by all the concerned in proportion of their share in the joint family properties.

8. The next grievance made on behalf of the Defendant Nos.2 to 4 is that the Commissioner has committed error in relying on the valuation report without considering other aspects of the matter. Suffice it to observe that the Commissioner was required to adopt that course having regard to the attitude adopted by the Defendant Nos.2 to 4. The Defendant Nos.2 to 4 were not coming forward with all the books of accounts or the details of income and expenditure in relation to the suit properties. The

Defendants caused to file affidavit of Defendant No.2 in the proceedings in April, 2003 which reads thus : -

> "1. I say that in the above suit I have been directed to file the Statement of Accounts pertaining to the property situated at Stone Building Chowpatty, Mumbai - 400 007.
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> 2. I say that in this regard I have to state that various properties were purchased by our father Motilal Jhaveri alongwith his brother Gandmal Ghasilal Jhaveri and Badamchand Ghasilal Jhaveri being two at Sheikh Memon Street. One property at Chowpatty was purchased in the joint names of Motilal Jhaveri and Badamchand Jhaveri being the subject matter of the suit. I crave leave to refer to and rely upon the papers and

proceedings when produced.

3. I say that all the income of all the properties stated above was deposited in a Common Bank Account, namely, Motilal Ghasilal Jhaveri bearing No.23075 in Union Bank of India, Opera House Branch. The expenses for the properties was paid for from the said Bank Account. To the best of my knowledge there was no separate Bank Account being maintained for the property at Chowpatty. I say that whenever any expenses was required to be done for any of the three properties the same would be paid from the Bank Account stated above. I say that the Plaintiff No.1 who is interested in the properties at Sheikh Memon Street is aware of the same. I say that to the best of my knowledge no separate Books of Accounts were maintained for Chowpatty

property or the other properties. In any event I do not have in our possession any of the Books of Accounts pertaining to the Chowpatty property. Therefore, I am unable to file Accounts as directed by the Commissioner High Court, Bombay."

9. The said Defendants caused to file further affidavit of Defendant No.2 on 25th April, 2003, which reads thus : -

"1. I am making this affidavit as per directions given by the Commissioner High Court, Bombay, in the above suit on 22nd April, 2003, for myself and on behalf of Defendant No.3 and 4.

2. I say that we have in our possession only the documents pertaining to the above suit which have been tendered by our Advocate in the office of

the Commissioner, High Court, Bombay on 22nd April, 2003.

3. I say that the documents pertaining to the year 2003 have not been tendered because the same are required for showing the same to various authorities. However, we are willing and ready to give inspection of the same as and when directed or called upon by the Advocate for the Plaintiff.

4. I say that as regards transfer of tenancy in the year 1990, the tenancy for Flat No.4 was transferred from Babubhai Jhaveri to Rajkumar Jain. Similarly, premises the rent receipt in the Ground floor admeasuring approximately 3368 sq.ft. carpet area was transferred in April, 1998 to one NES International Pvt. ltd. which were earlier in the name of

Amritlal Bhimji Jhaveri. Part portion is also let out to Yusuf Ibrahim in 2000. Thereafter in November, 2000 a deed of list has been executed in favour of NES International Pvt. Ltd. I crave leave to refer to and rely upon a copy of the deed of this dated 20th day of November, 2000. We are willing and ready to give inspection of the same as and when directed or called upon by the Advocate for the Plaintiff.

5. I say that whatever is stated hereinabove is true to the best of my knowledge and belief and the directions given by the Commissioner on 22nd April, 2003, as accordingly been complied with."

10. From the stand taken by the said Defendants, it was obvious that the Defendants were not forthcoming with all the information.

All such information was within the personal knowledge of the the Defendant Nos.2 to 4, who were managing the joint family properties. In such a situation, the Commissioner was justified in drawing adverse inference and decide the matter in issue on that basis.

11. The next grievance of the said Defendants that no assertion has been made in the plaint or any issue framed or any evidence available on record to justify that the Defendants were managing the affairs of the joint family properties, is belied by the evidence of the Defendants given before this Court on 14th April, 2002. In paragraph 5 of that evidence, the Defendant No.2 has admitted that since 1954, the joint family properties in question were managed by the said Defendants. If it is so, the income and expenditure in respect of the joint family properties was within the personal knowledge of the Defendants. The Defendants were expected to

come forward with all the material to provide related information. In absence thereof, the Commissioner cannot be faulted with for having relied on the valuation report to draw adverse inference against the said Defendants.

12. To get over this position, Counsel for the Defendants would contend that insofar as the property let out to Mahindra Holdings Pvt. Ltd., which is admeasuring about 3400 sq. ft., situated at Chowpatty, Mumbai was receiving income of only Rs.6,000/- per month. It is incomprehensible that in such a prime location, the property would receive such a meagre income. In any case, as the matter is required to be considered by the Commissioner afresh, the Commissioner may consider all aspects of the matter by giving fair opportunity to parties to prove or disapprove the claim against each other in that behalf.

13. Insofar as the property admeasuring about 900 sq.ft. given to E.Jusaf, which is also situated at Chowpatty, but is on the rear side of the building which is allegedly receiving income only of Rs.2,000/- per month. The said premises are admeasuring about 900 sq.ft. Once again, it is inconceivable that the premises which are situated in such a prime location would derive income of Rs.2,000/- only though admeasures about 900 sq.ft.

14. All issues in relation to the suit properties will have to be considered afresh by the Commissioner on the basis of material already produced or likely to be produced by parties and, more particularly, in the context of entries in the Bank account of Union Bank of India.

15. There is another property being hoarding displayed on the suit building. According to both sides, the computation done by the

Commissioner in relation to income and expenditure of the said hoarding is incorrect. Insofar as the income received in relation to the said hoarding, though in the name of the dependants and children of the Defendant Nos.2 to 4 and 7, that amount will have to be reckoned for computation of income and expenditure received in relation to the the said property, which undisputedly belongs to joint family property. In other words, the Commissioner will re-examine all aspects of the matter and take into account even the amounts received by the Defendant Nos.2 to 4 and 7 and/or their dependants and children in relation to the said hoarding.

16. There is yet another property being flat No.4. The grievance of the plaintiffs is that the said flat has been transferred in the year 1990. The said flat admeasures about 2500 sq.ft. which is situated at Chowpatty in the same building. It is obvious that substantial amount

towards transfer charges must have been enjoyed while permitting transfer of the said property. The concerned defendants will be obliged to disclose the details of such transaction. It is open to the parties to adduce such evidence as may be advised in that behalf on the basis of which the Commissioner may proceed to decide the issues on its own merits.

17. In view of the observations made in the earlier part of the judgement, the appropriate course is to dispose off both the chamber summons by setting aside the Commissioner’s Report dated 30th August, 2004 and instead the Commissioner is directed to reconsider the entire matter afresh by giving fair opportunity to the respective parties to produce further evidence as may be advised. All questions in respect of computation of income and expenditure related to joint family properties will have to be taken into account on its own merits and in accordance with law afresh.

18. The parties shall appear before the Commissioner on 24th October, 2007, at 11.00 a.m. The Commissioner may assign date and time to the parties to file further evidence as may be advised, while ensuring that the report is concluded not later than 7th December, 2007.

19. Both the chamber summons are disposed off in the above terms.

(A.M.Khanwilkar, J.)